

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

7 BENJAMIN R. NEESE, )  
8 Plaintiff, ) No. CV-10-00296-CI  
9 v. ) ORDER DENYING PLAINTIFF'S  
10 MICHAEL J. ASTRUE, Commissioner ) MOTION FOR SUMMARY JUDGMENT  
11 of Social Security, ) AND GRANTING DEFENDANT'S  
12 Defendant. ) MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment. (ECF No. 13, 20.) Attorney David L. Lybbert represents Benjamin Neese (Plaintiff); Special Assistant United States Attorney Franco L. Bacia represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (ECF No. 6.) After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment, and directs entry of judgment for Defendant.

## JURISDICTION

Plaintiff protectively filed for disability insurance benefits (DIB) and Supplemental Security Income (SSI) on May 3, 2007. (Tr. 128.) He alleges disability due to "bipolar/manic depression/spinal bifida/ back fusion" with an onset date of September 15, 2005. (Tr. 118.) Benefits were denied initially and on reconsideration.

1 Plaintiff timely requested a hearing before an administrative law  
 2 judge (ALJ), which was held before ALJ Michael Hertzig on October  
 3 16, 2009. (Tr. 27-41.) Plaintiff, who was represented by counsel,  
 4 testified. Vocational expert Daniel McKinny (VE) was present but  
 5 did not testify. (Tr. 27-28.) The ALJ denied benefits on November  
 6 3, 2009, and the Appeals Council denied review. (Tr. 1-4, 17-26.)  
 7 The instant matter is before this court pursuant to 42 U.S.C. §  
 8 405(g).

9 **STANDARD OF REVIEW**

10 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
 11 court set out the standard of review:

12 A district court's order upholding the Commissioner's  
 13 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,  
 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the  
 14 Commissioner may be reversed only if it is not supported  
 by substantial evidence or if it is based on legal error.  
*Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).  
 15 Substantial evidence is defined as being more than a mere  
 scintilla, but less than a preponderance. *Id.* at 1098.  
 16 Put another way, substantial evidence is such relevant  
 evidence as a reasonable mind might accept as adequate to  
 17 support a conclusion. *Richardson v. Perales*, 402 U.S.  
 389, 401 (1971). If the evidence is susceptible to more  
 18 than one rational interpretation, the court may not  
 substitute its judgment for that of the Commissioner.  
*Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*  
*Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

20 The ALJ is responsible for determining credibility,  
 21 resolving conflicts in medical testimony, and resolving  
 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
 22 Cir. 1995). The ALJ's determinations of law are reviewed  
*de novo*, although deference is owed to a reasonable  
 23 construction of the applicable statutes. *McNatt v. Apfel*,  
 201 F.3d 1084, 1087 (9th Cir. 2000).

25 It is the role of the trier of fact, not this court, to resolve  
 26 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence  
 27 supports more than one rational interpretation, the court may not  
 28

1 substitute its judgment for that of the Commissioner. *Tackett*, 180  
2 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
3 Nevertheless, a decision supported by substantial evidence will  
4 still be set aside if the proper legal standards were not applied in  
5 weighing the evidence and making the decision. *Brawner v. Secretary*  
6 *of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). If  
7 there is substantial evidence to support the administrative  
8 findings, or if there is conflicting evidence that will support a  
9 finding of either disability or non-disability, the finding of the  
10 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
11 1230 (9<sup>th</sup> Cir. 1987).

## **SEQUENTIAL EVALUATION**

13       Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the  
14 requirements necessary to establish disability:

Under the Social Security Act, individuals who are "under a disability" are eligible to receive benefits. 42 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any medically determinable physical or mental impairment" which prevents one from engaging "in any substantial gainful activity" and is expected to result in death or last "for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). Such an impairment must result from "anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). The Act also provides that a claimant will be eligible for benefits only if his impairments "are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy. . ." 42 U.S.C. § 423(d)(2)(A). Thus, the definition of disability consists of both medical and vocational components.

In evaluating whether a claimant suffers from a disability, an ALJ must apply a five-step sequential inquiry addressing both components of the definition, until a question is answered affirmatively or negatively in such a way that an ultimate determination can be made.

20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The claimant bears the burden of proving that [s]he is disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). This requires the presentation of "complete and detailed objective medical reports of h[is] condition from licensed medical professionals." *Id.* (citing 20 C.F.R. §§ 404.1512(a)-(b), 404.1513(d)).

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one through four, the burden of proof rests upon the claimant to establish a *prima facie* case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971). This burden is met once a claimant establishes that a physical or mental impairment prevents her from engaging in her previous occupation. 20 C.F.R. §§ 404.1520(a), 416.920(a). If a claimant cannot do past relevant work, the ALJ proceeds to step five, and the burden shifts to the Commissioner to show that (1) the claimant can make an adjustment to other work; and (2) specific jobs exist in the national economy which claimant can perform. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496, 1497-98 (9<sup>th</sup> Cir. 1984).

## **STATEMENT OF THE CASE**

21 The facts of the case are set forth in detail in the transcript  
22 of proceedings and are briefly summarized here. In June 2004, ALJ  
23 R.J. Payne found Plaintiff disabled under Listing 1.04A for a closed  
24 period ending on October 7, 2003. (Tr. 29, 48.) Plaintiff  
25 reapplied for benefits in May 2007, which were denied initially and  
26 on reconsideration. Plaintiff requested a hearing, which was held  
27 in October 2009 before ALJ Hertzig.

At the time of the hearing, Plaintiff was 31 years old, unmarried, and living with his parents. (Tr. 32.) He stated he has a daughter who does not live with him. (Tr. 33-34.) He reported a ninth grade education and past work as a construction laborer, with his last job ending in July 2006. (Tr. 32, 118-19, 123.) Plaintiff testified he had a brief incarceration in 2005 for a drug-related conviction. (Tr. 32, 34-35.) His representative stated Plaintiff could no longer do regular work due to disabling mental health problems. (Tr. 30.)

## **ADMINISTRATIVE DECISION**

11 ALJ Hertzig found prior concurrent claims filed in November  
12 2005, which were denied in February 2006, were not timely appealed.  
13 He found no reason was presented that warranted reopening the  
14 February 2006 determinations.<sup>1</sup> (Tr. 17.) He specifically noted that  
15 evidence existing at the time of the February 2006 decision was  
16 considered in this case "strictly for the purpose of establishing  
17 medical history." (*Id.*) The ALJ then found Plaintiff met insured  
18 status requirements for DIB through March 31, 2008. (Tr. 25.) At  
19 step one of the sequential evaluation process, he found Plaintiff  
20 had not engaged in substantial gainful activity since the alleged  
21 onset date of September 15, 2005. (*Id.*) He found Plaintiff had  
22 severe impairments of "status post 2003 lumbar fusion with more  
23 recent MRI evidence of minor degenerative changes, depressive  
24 disorder, anxiety, and a history of substance abuse." (*Id.*) He

<sup>1</sup> As a general rule, the Commissioner's explicit refusal to reopen a prior application is not subject to judicial review. *Lester v. Chater*, 81 F.3d 821, 827 (9<sup>th</sup> Cir. 1995).

1 also found medical impressions of auditory dyslexia, bipolar  
2 disorder, intermittent explosive disorder, panic attacks, borderline  
3 personality, and leg fractures were unsupported by medical evidence  
4 and/or of insufficient duration to qualify as a severe impairment.  
5 (Tr. 22.) At step three, he found medically established  
6 impairments, alone and in combination, did not meet or medically  
7 equal one of the listed impairments in 20 C.F.R., Appendix 1,  
8 Subpart P, Regulations No. 4 (Listings). (Tr. 25.) At step four,  
9 the ALJ determined Plaintiff had the residual functional capacity  
10 (RFC) to perform light work, "of an unskilled nature which involved  
11 simple 1 to 2 step tasks." (*Id.*)

12 In his step four findings, ALJ summarized Plaintiff's  
13 testimony, made credibility findings, and concluded Plaintiff's  
14 allegations lacked credibility. (Tr. 23-24.) He concluded  
15 Plaintiff could not perform his past relevant work, but his  
16 limitation to light unskilled work did not erode significantly the  
17 occupational base available to Plaintiff. (Tr. 26.) Applying the  
18 Medical-Vocational Guidelines (Grids), the ALJ concluded Plaintiff  
19 could perform other work in the national economy and was not  
20 "disabled" as defined by the Social Security Act. (*Id.*)

## 21 ISSUES

22 The question is whether the ALJ's decision is supported by  
23 substantial evidence and free of legal error. Plaintiff argues the  
24 ALJ erred when he: (1) improperly rejected examining and non-  
25 examining medical source opinions; (2) erroneously denied  
26 Plaintiff's request for a continuance; (3) failed to assist  
27 Plaintiff by requesting more recent treatment records and ordering  
28

1 a consultative physical exam; (4) improperly assessed his RFC; and  
 2 (5) erroneously relied on the Grids at step five. (ECF No. 14.)

3 **A. Credibility**

4 In his Reply, Plaintiff appears to challenge the ALJ's  
 5 credibility findings, but fails to specify which findings were not  
 6 valid and unsupported by the record. (ECF No. 22 at 8.) Generally,  
 7 the court will not address issues that are inadequately briefed.  
 8 *Carmickle v. Comm of Soc Sec*, 533 F.3d 1155, 1161 n.2 (2008)(citing  
 9 *Paladin Assoc. v. Montana Power Co.* 328 F.3d 1145, 1164 (9<sup>th</sup> Cir.  
 10 2003)). Nonetheless, *de novo* review indicates the ALJ's credibility  
 11 findings are "clear and convincing" and supported amply by  
 12 substantial evidence. *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9<sup>th</sup>  
 13 Cir. 2008); *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9<sup>th</sup> Cir.  
 14 2007); *Burch v. Barnhart*, 400 F.3d 676, 680 (9<sup>th</sup> Cir. 2005); *Light v.*  
 15 *Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

16 Although credibility determinations are the sole province of  
 17 the ALJ, when the adjudicator finds a claimant's statements  
 18 regarding the severity of impairments and limitations are not  
 19 credible, he must make a credibility determination with findings  
 20 sufficiently specific to permit the court to conclude the ALJ did  
 21 not arbitrarily discredit claimant's allegations. *Richardson*, 402  
 22 U.S. at 400; *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9<sup>th</sup> Cir.  
 23 2002); *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9<sup>th</sup> Cir. 1991) (en  
 24 banc); *Fair v. Bowen*, 885 F.2d 597, 604 (9<sup>th</sup> Cir. 1989). When  
 25 assessing a claimant's credibility, the lack of objective medical  
 26 evidence is a proper factor to consider along with: a claimant's  
 27 treatment history; daily activities; effectiveness of medication;  
 28

1 work record; a claimant's reputation for truthfulness;  
2 inconsistencies in his testimony, or between his testimony and  
3 conduct; and observations of physicians and third parties with  
4 personal knowledge of the claimant's symptoms. *Tommasetti*, 533 F.3d  
5 at 1039; *Burch*, 400 F.3d at 680; SSR 96-7p. Here, after summarizing  
6 Plaintiff's hearing testimony, the ALJ specifically found  
7 Plaintiff's allegations regarding limitations caused by his  
8 impairments lacked credibility. (Tr. 23.)

9 In support of this finding, the ALJ found the medical evidence  
10 indicates Plaintiff's treatment and medication relieved and/or  
11 controlled his pain and symptoms, that there was no medical evidence  
12 to show Plaintiff's knee fracture in 2007 caused significant  
13 functional limitations that lasted more than twelve months, and that  
14 medical opinions from the examining orthopedist and examining  
15 psychologist in 2008 did not indicate disabling dysfunction from  
16 back or mental health impairments. The ALJ also referenced specific  
17 examples of Plaintiff's lack of candor about his drug use history,  
18 including repeated (and unexplained) urinalysis results positive for  
19 cocaine and the examining psychologist's observation of inconsistent  
20 report of drug use. (*Id.*; Tr. 333, 342, 442, 444.) Lack of candor  
21 about illegal drug use is sufficient to reject a claimant's  
22 testimony. *Verduzco v. Apfel*, 188 F.3d 1087, 1090 (9<sup>th</sup> Cir. 1999).  
23 In addition, the ALJ referenced Plaintiff's reported daily  
24 activities in support of the adverse credibility findings. As found  
25 by the ALJ, Plaintiff reported doing house work and yard work,  
26 walking for exercise, shopping, and an ability to pay bills, manage  
27 money, drive and use public transportation. (Tr. 23-24, 442.)  
28

1 These reported daily activities are not consistent with Plaintiff's  
2 allegations of a total inability to work and, therefore, support an  
3 adverse credibility determination. *Tommasetti*, 533 F.3d at 1039;  
4 *Burch*, 400 F.3d at 680.

5 Where substantial evidence supports the ALJ's credibility  
6 determination, the court may not second-guess the Commissioner's  
7 interpretation even "where the evidence is susceptible to more than  
8 one rational interpretation." *Magallanes*, 881 F.2d 747, 750 (9<sup>th</sup>  
9 Cir. 1989); see also *Morgan*, 169 F.3d at 599 (credibility  
10 determination is function solely of the Commissioner). The ALJ did  
11 not err in finding Plaintiff lacked credibility.

12 **B. Step Two Findings - Severe Impairments**

13 Plaintiff asserts the ALJ "did not include nor consider as  
14 severe impairments, the claimant's history of a learning disorder,  
15 borderline IQ, ADHD, or auditory dyslexia, which are diagnosed and  
16 considered by several types of specialists." (ECF No. 14 at 17.)  
17 Plaintiff's argument is not supported by the ALJ's decision or by  
18 objective medical evidence, as required by the Regulations.

19 At step two of the sequential evaluation, the ALJ determines  
20 whether a claimant suffers from a "severe" impairment, i.e., one  
21 that significantly limits his physical or mental ability to do basic  
22 work activities. 20 C.F.R. §§ 404.1520(c), 416.920(c). To satisfy  
23 step two's requirement of a severe impairment, the claimant must  
24 prove the existence of a physical or mental impairment by providing  
25 medical evidence consisting of signs, symptoms, and laboratory  
26 findings. The fact that a medically determinable condition exists  
27 does not automatically mean the symptoms are "severe," or  
28

1 "disabling" as defined by the Social Security regulations. See,  
2 e.g., *Edlund*, 253 F.3d at 1157-58; *Fair*, 885 F.2d at 603; *Key v.*  
3 *Heckler*, 754 F.2d 1545, 1549-50 (9<sup>th</sup> Cir. 1985).

4 Here, the ALJ specifically addressed the conditions identified  
5 by Plaintiff in his briefing. (Tr. 22.) The ALJ reasonably  
6 determined objective medical evidence did not establish the  
7 referenced conditions as severe impairments. For example, the ALJ  
8 found the documented impression of auditory dyslexia was based on  
9 Plaintiff's subjective complaint, and no objective medical evidence  
10 was submitted to establish this diagnosis. (Tr. 22.) Plaintiff's  
11 statements to providers are insufficient to establish a severe  
12 impairment. 20 C.F.R. §§ 404.1508, 416.908. Further, as noted by  
13 the ALJ, examining psychologist Thomas Genthe, Ph.D., observed that  
14 Plaintiff had no problem following a conversation during his exam.  
15 (Tr. 22, 442.) The ALJ also discussed impressions of bipolar  
16 disorder, panic attacks, and intermittent explosive disorder that  
17 were found in the record, and found these impressions were not  
18 corroborated by treatment evidence, examining medical source  
19 opinions, or clinical observations. (Tr. 22.)

20 Regarding allegations of a learning disorder, borderline  
21 functioning, and ADHD, Plaintiff's conclusory assumption that these  
22 conditions exist, based on an unsupported observation by Dr. Goodwin  
23 in 2005 and 2006 when Plaintiff was actively using drugs, is  
24 insufficient to meet his step two burden. (ECF 14 at 17.) As found  
25 by the ALJ, nurse practitioner reports covering four years of  
26 treatment do not include clinical observations of these conditions,

27

28

1 and the acceptable medical sources did not include these diagnoses  
2 in their diagnostic impressions. (Tr. 22.) Further, even assuming  
3 these conditions could be established, Plaintiff's reported daily  
4 activities, ability to manage his finances, and overall normal  
5 mental status assessed by the examining psychologist (Tr. 442), do  
6 not reflect cognitive functioning that would significantly impact  
7 Plaintiff's ability to perform unskilled work. *Edlund*, 253 F.3d at  
8 1159-60. Plaintiff's assertion that the ALJ did not consider non-  
9 severe impairments fails. The ALJ properly addressed the evidence  
10 of these conditions and gave legally sufficient reasons for finding  
11 them non-severe.

12 **C. Evaluation of Medical Evidence**

13 After briefly presenting his interpretation of the evidence,  
14 Plaintiff makes the general assertion that the ALJ failed to apply  
15 proper legal standards in his decision. (ECF No. 14 at 8-10.)  
16 Plaintiff argues the ALJ improperly rejected or failed to address  
17 findings of examining psychologists James Goodwin, Ph.D., and Thomas  
18 Genthe, Ph.D., examining physician Gaffield, D.O., and reviewing  
19 psychologist Mary Gentile, Ph.D. (ECF No. 14 at 14, 17, 20.)  
20 However, *de novo* review of the record in its entirety indicates the  
21 ALJ's evaluation of the medical records reflects a reasonable  
22 interpretation of the evidence in its entirety that is supported by  
23 substantial evidence.

24 **1. Acceptable Medical Sources**

25 **a. Dr. Goodwin, Ph.D.**

26 As an examining psychologist, Dr. Goodwin's opinions must be  
27

1 considered and can be rejected only with "clear and convincing"  
2 reasons. If medical findings are contradicted by other medical  
3 source opinions, the ALJ's reasons for rejection must be "specific"  
4 and "legitimate." *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir.  
5 1995); *Andrews*, 53 F.3d at 1043. The record shows Dr. Goodwin  
6 examined Plaintiff in September 2005 and in April and October 2006.  
7 Dr. Goodwin consistently diagnosed major depressive disorder,  
8 recurrent moderate, and polysubstance abuse in remission. These  
9 diagnoses are reflected in the ALJ's step two findings. (Tr. 20,  
10 25, 193, 204, 216.) In his evaluation summaries, Dr. Goodwin opined  
11 Plaintiff had "marked" limitations in the social functioning  
12 criteria. The ALJ specifically rejected the marked rating because  
13 (1) the severity of the assessed limitation was inconsistent with  
14 the multiple diagnoses of moderate depressive disorder; (2) Dr.  
15 Goodwin did not have access to records from other providers during  
16 the same period that documented Plaintiff's ongoing substance abuse  
17 and noncompliance with prescribed medication; and (3) the evidence  
18 does not establish the duration requirement for an impairment of  
19 that severity.<sup>2</sup> (Tr. 23.) These are "clear and convincing" reasons  
20 to reject an examining medical source opinion. Further, these

<sup>2</sup> A disabling impairment must last or be expected to last for a continuous period of 12 months. 20 C.F.R. §§ 404.1505, 416.905. The record should document all pertinent symptoms, signs and laboratory findings, as well as prescribed treatment, and the response to treatment in terms of changes in symptoms. SSR 82-52 (Documentation).

1 reasons are supported by substantial evidence and reflect a rational  
2 interpretation of the record in its entirety. *Vasquez v. Astrue*,  
3 572 F.3d 586, 591 (9<sup>th</sup> Cir. 2009).

4 For example, as noted by the ALJ, in March 2006, Plaintiff  
5 reported depression and anxiety to treating nurse practitioner Holly  
6 Williams. However, at that time, he was not on medication. (Tr.  
7 20, 350, 355.) By May 2006, Ms. Williams noted he was stable on  
8 depression medication, and his complaints of anxiety stopped when he  
9 was compliant with prescribed daily medication. (Tr. 345.) Due to  
10 problems with non-compliance, Plaintiff was required to sign a pain  
11 medication contract in July 2006. (Tr. 342.) In October 2006, Ms.  
12 Williams noted Plaintiff's unexplained urinalysis results positive  
13 for cocaine and negative for his prescribed medication. (Tr. 333,  
14 342.) Plaintiff's unexplained positive drug testing was discussed  
15 repeatedly in clinic notes through January 2007. (Tr. 330-37.) The  
16 record also shows that in early 2007, Plaintiff was incarcerated for  
17 cocaine-related charges. (Tr. 327.) The ALJ reasonably concluded  
18 mental limitations assessed during this time were affected by  
19 Plaintiff's failure to take prescribed medication and use of illicit  
20 drugs. The ALJ did not err in giving little weight to the  
21 limitations assessed by Dr. Goodwin.<sup>3</sup>

22  
23  
24         <sup>3</sup> Although Plaintiff argues that, according to Dr. Goodwin, he  
25 had "zero math skills and severe impairments in reading and  
26 understanding," (ECF No. 14 at 17), Plaintiff reported to Dr. Genthe  
27 in 2008 that he was capable of counting money, making deposits and  
28 withdrawals at the bank, paying his bills, making purchases, and

1           **b. Dr. Gaffield, D.O.**

2           Dr. Gaffield examined Plaintiff at the agency's request in  
3 February 2008. (Tr. 21, 424.) In his functional assessment, he  
4 noted Plaintiff had a surgical repair of a fracture of the left knee  
5 in 2007, and had just completed physical therapy. (Tr. 425.) Dr.  
6 Gaffield opined Plaintiff was capable of sitting eight hours in an  
7 eight hour day, but specifically noted that "in view of the recent  
8 fracture involving the left lower extremity and the fact that he is  
9 currently under orthopedic care," he did not expect Plaintiff to  
10 walk or stand more than two hours during the eight hour day. (Tr.  
11 429.) Plaintiff argues the ALJ erred in finding the limitation to  
12 two hours standing/walking did not persist beyond 12 months after  
13 the injury. (ECF No. 14 at 15; Tr. 22.) Plaintiff also contends  
14 "the Social Security Administration must assume [his  
15 standing/walking restrictions] are permanent." This contention is  
16 unsupported by the record and misconstrues the legal standards  
17 applicable to these proceedings.

18           As noted above, it is the claimant's burden to present medical  
19 evidence of an impairment, and it is solely the responsibility of  
20 the ALJ to evaluate the medical evidence and resolve ambiguities  
21 and/or conflicts. *Andrews*, 53 F.3d at 1039. Where substantial  
22 evidence supports the ALJ's interpretation of the medical evidence,  
23

---

24 writing checks. (Tr. 445.) In addition, contemporaneous treatment  
25 notes from Holly Williams, ARNP, do not reflect significant  
26 cognitive deficits or an inability to understand and cooperate in  
27 medical care or function on a daily basis. (Tr. 345-55.)  
28

1 the court will not second-guess his conclusions and findings.  
2 *Tackett*, 180 F.3d at 1097. ALJ Hertzig met his burden when he  
3 thoroughly summarized Dr. Gaffield's findings and conclusions and  
4 made his RFC findings. *Magallanes*, 881 F.2d 751; (Tr. 21, 24, 429).  
5 Further, the ALJ properly discounted Dr. Gaffield's assessed  
6 limitation of no more than two hours standing due to a recent knee  
7 injury, explaining that the standing/walking limitation was assessed  
8 shortly after Plaintiff's knee fracture and surgery in late 2007.  
9 (Tr. 24.) His finding that the medical evidence did not indicate  
10 ongoing "left leg pain, weakness and limitation of motion," (*id.*),  
11 is a "clear and convincing" reason to discount the standing  
12 limitation of two hours. 20 C.F.R. §§ 404.1509. 416.909  
13 (impairments must be expected to last continuously for at least 12  
14 months). Plaintiff's speculation that his fracture "may" have  
15 lasted more than 12 months, is insufficient to meet his burden of  
16 proof. Without supporting medical evidence to establish duration,  
17 Plaintiff's argument fails.

18 The ALJ also reasoned Plaintiff's reported activities of daily  
19 living throughout the record do not reflect the degree of limitation  
20 experienced during his recovery from knee surgery. (Tr. 24, 360,  
21 398-99.) This is a clear and convincing reason to discount a  
22 medical opinion. *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9<sup>th</sup> Cir.  
23 2001). Finally, as discussed below, the ALJ found Plaintiff capable  
24 of performing a full range of light work, which includes a full  
25 range of sedentary work. 20 C.F.R. §§ 404.1567(b), 416.967(b).  
26 "Jobs are sedentary if walking and standing are required  
27 occasionally and other sedentary criteria are met." 20 C.F.R. §§

28

1 404.1567(a), 416.967(a). "Occasional" means very little, up to one  
2 third of the time (about two hours of an eight hour work day). SSR  
3 83-10. Because sedentary work requires only two hours of walking  
4 and standing, even if Plaintiff's unsupported assertion were  
5 credited, it would not change the outcome of these proceedings. The  
6 ALJ's evaluation of and weight given to Dr. Gaffield's report is  
7 supported by substantial evidence and without error.

8       **c. Dr. Gentile, Ph.D.**

9       In March 2008, following Dr. Genthe's examination, Mary A.  
10 Gentile, Ph.D., reviewed the medical evidence and completed a  
11 Psychiatric Review Technique and a RFC assessment in which she noted  
12 recent findings by Dr. Genthe that Plaintiff's behavior and  
13 interaction at the evaluation were inconsistent with his self-  
14 reported deficits. (Tr. 449-65, 461.) Based on her review, Dr.  
15 Gentile assessed moderate limitations the categories of attention  
16 and concentration, social interaction and adaptation and concluded  
17 Plaintiff was capable of "simple and well-learned complex tasks."  
18 (Tr. 463-65.) In her narrative summary of the review, she noted  
19 Plaintiff "may have episodic lapses" in attention and concentration  
20 due to pain and psychological symptoms, and would do best away from  
21 the general public and co-worker interaction, and in a routine  
22 environment due to personality issues." (Tr. 465.) Plaintiff argues  
23 the ALJ failed to include the moderate limitations assessed by Dr.  
24 Gentile. (ECF No. 14 at 14.) This argument is without merit.

25       The opinion of a non-examining psychologist such as Dr. Gentile  
26 cannot constitute substantial evidence unless it is supported by  
27 other medical evidence. As acknowledged by Plaintiff, a non-

28

1 examining medical source opinion, by itself, cannot justify the  
2 rejection of an examining source opinion. ECF No. 14 at 13 (citing  
3 *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9<sup>th</sup> Cir. 1990); see also  
4 *Lester*, 81 F.3d at 830 (opinion of examining physician is entitled  
5 to greater weight than non-examining opinion). Further, a  
6 claimant's RFC is an administrative finding based on the entire  
7 record: no special significance is given a single medical source  
8 opinion. 20 C.F.R. §§ 404.1527(e), .1546; 416.927(e), .946; SSR 96-  
9 5p.

10 Here, the ALJ discussed Dr. Gentile's review of the evidence,  
11 noting it was generally consistent with his final RFC determination.  
12 (Tr. 24.) However, he specifically rejected Dr. Gentile's opinions  
13 regarding limited contact with the general public and co-workers  
14 because the evidence did not support these restrictions or a  
15 diagnosis of bipolar disorder. (Tr. 24.) The ALJ found reports  
16 from treating physician Eric Olson, M.D., and examining psychologist  
17 Genthe did not identify a basis for a significant personality  
18 disorder. These examining medical source findings are sufficient to  
19 reject a non-examining medical opinion.

20 Other evidence supports rejection of these functional  
21 limitations. As noted by the ALJ, on September 8, 2005, Plaintiff  
22 was assessed with depression, anxiety, cannabis dependence, and  
23 borderline personality by Julie Rickard, Ph.D., at Columbia Valley  
24 Community Health Services (CVCH). (Tr. 19, 22, 358.) However, this  
25 assessment was based on Plaintiff's statements at a time when he  
26 also reported chronic cannabis abuse. (Tr. 357-58.) In April 2006,  
27 Dr. Goodwin found Plaintiff generally cooperative and appropriate  
28

1 with an unimpaired level of consciousness. (Tr. 203). Dr. Goodwin  
2 found no indication of current antisocial behavior and diagnosed a  
3 major depressive disorder (moderate) and alcohol abuse in remission  
4 for 18 months. (Tr. 204.) In May 2006, ARNP Holly Williams at CVCH  
5 reported the borderline personality condition was stable and  
6 Plaintiff was starting a job. (Tr. 345.) Therefore, the ALJ could  
7 reasonably infer from this evidence that the impression of  
8 borderline personality was unsupported by clinical observations and  
9 not reflected in mental health evaluations. (Tr. 22.) *Tommasetti*,  
10 533 F.3d at 1040 (ALJ entitled to draw inferences flowing from the  
11 evidence). Plaintiff does not address these findings by the ALJ and  
12 does not cite to medical source evidence in the record that would  
13 arguably support Dr. Gentile's assessment of limitations due to a  
14 personality disorder. The ALJ's omission of personality disorder  
15 related symptoms is a rational interpretation of the entire record.

16 As for Dr. Gentile's summary conclusion of moderate limitations  
17 in Plaintiff's "ability to maintain attention and concentration for  
18 extended periods," she elaborated on her conclusions in Section III  
19 of the RFC assessment, stating specifically that Plaintiff was  
20 "capable of simple and well-learned complex tasks." (Tr. 465.)  
21 Although Dr. Gentile's comment that Plaintiff "may have lapses" in  
22 attention and concentration due to subjective symptom allegations is  
23 speculative, her narrative findings are consistent with the ALJ's  
24 determination that Plaintiff was limited to unskilled work  
25 "involving simple 1 to 2 step tasks." (Tr. 24.) Viewing the  
26 evidence in its entirety, including Plaintiff's lack of candor about  
27 his drug use and other problems with credibility (see Tr. 461),  
28

1 ALJ's RFC determination reflects a reasonable interpretation of Dr.  
 2 Gentile's conclusions and narrative elaboration, along with  
 3 examining medical source observations and conclusions, clinic notes,  
 4 and Plaintiff's self-reported daily activities. The ALJ did not err  
 5 in the weight given Dr. Gentile's non-examining opinions.

6

7       **2. Other Medical Sources - Holly Williams, ARNP; Caitilin**  
**Newman, MS NCC (Nationally Certified Counselor)**

8       Referencing observations by Ms. Williams during routine follow-  
 9 up exams at CVCH in 2006 and 2007, Plaintiff argues the ALJ "failed  
 10 to recognize the severe impairments" of "thoracic muscle spasm and  
 11 lumbar muscle spasm." (ECF No. 14 at 18.) Plaintiff also references  
 12 an assessment form in which Ms. Newman noted two marked limitations  
 13 in Plaintiff's social functioning, and five marked "functional  
 14 mental disorders." (ECF No. 14 at 11; Tr. 266-69.) Plaintiff  
 15 argues this report was rejected erroneously by ALJ and supports a  
 16 finding of "disabled." (*Id.*)

17       Ms. Newman and Ms. Williams are "other sources" under the  
 18 Regulations. 20 C.F.R. §§ 404.1513(d)(1), 416.913(d)(1). Neither  
 19 is an acceptable medical source and qualified to diagnose an  
 20 impairment. 20 C.F.R. §§ 404.1513(a), (d) (4), 416.913(a), (d) (4); SSR  
 21 06-03p. However, their opinions regarding how Plaintiff's  
 22 impairments affect his ability to work must be considered and may be  
 23 rejected only with specific, "germane" reasons. *Lewis v. Apfel*, 236  
 24 F.3d 503, 511 (9<sup>th</sup> Cir. 2001); *Nguyen v. Chater*, 100 F.3d 1462, 1467  
 25 (9<sup>th</sup> Cir. 1996).

26       The records from CVCH in their entirety show that at the same  
 27 time Ms. Williams observed muscle spasms, she found no sensory loss,  
 28

1 no motor weakness, and intact balance and gait. (Tr. 348.) By May  
2 2006, she noted Plaintiff was stable and doing well. (Tr. 353-54,  
3 356.) In September 2006, Ms. Williams found Plaintiff was stable,  
4 exhibited normal mobility and curvature of the spine, no tenderness  
5 of the thoracic spine, and muscle spasms around the lumber spine.  
6 (Tr. 340.) The ALJ appropriately recognized medical evidence of  
7 muscle spasms in his summary of the medical evidence, considered Ms.  
8 Williams observations with the rest of the evidence, and  
9 incorporated her observations into his step four findings that  
10 Plaintiff was limited to lifting 20 pounds occasionally. (Tr. 19-  
11 24.) Further, as noted by the ALJ, on exam, Dr. Gaffield noted  
12 lumbar spasms and concluded Plaintiff could perform light work.  
13 (Tr. 21-22, 426, 428, 429.) The ALJ discussed and adopted Dr.  
14 Gaffield's assessment with respect to Plaintiff's back condition and  
15 ability to lift and carry. (Tr. 24.) Plaintiff's argument that  
16 muscle spasms observed by Ms. Williams and Dr. Gaffield were  
17 disregarded by the ALJ is unsupported by the record.

18 The evaluation form completed by Ms. Newman is dated May 17,  
19 2007, and is not accompanied by treatment notes or a narrative  
20 report. (Tr. 266-69.) As a general rule, an ALJ is only required to  
21 explain why significant probative evidence is rejected. *Vincent v.*  
22 *Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984). Here, ALJ Hertzig  
23 was not obliged to accept Ms. Newman's findings because they are  
24 brief, conclusory, unsupported by clinic notes or her personal  
25 observations, and unexplained by a narrative report. *Thomas*, 278  
26 F.3d at 957 (brief, conclusory medical source opinion not  
27 probative). Plaintiff does not cite to evidence that supports Ms.  
28

1 Newman's findings, other than his own subjective complaints which  
2 were properly rejected as not credible by the ALJ.

3       Nonetheless, the ALJ addressed the assessment forms from Ms.  
4 Newman and Ms. Williams, and gave them no weight because the  
5 providers are not acceptable medical sources. (Tr. 25, 266-73.)  
6 The fact that an "other source" is not an acceptable medical source  
7 (e.g., a licensed physician or psychologist) is a valid reason for  
8 disregarding diagnoses contained in these forms. *SSR 06-03p*.  
9 ("'Other sources' cannot establish the existence of a medically  
10 determinable impairment.") Although the ALJ's reason is not a valid  
11 reason for rejecting functional limitations included in these forms,  
12 the error is harmless. Both assessment forms are conclusory and  
13 unsupported by acceptable medical source evidence.<sup>4</sup> Because these  
14 "other source" form reports are not probative, remand to correct any  
15 error would not change the outcome of these proceedings. Therefore,  
16 the error does not require remand. *Stout v. Commissioner, Social*  
17 *Sec. Admin.*, 454 F.3d 1050, 1056 (9<sup>th</sup> Cir. 2006).

18 **D. Duty to Develop Record**

19 Plaintiff argues the ALJ erred when he refused to comply with  
20 Plaintiff's request for assistance in providing records. He

---

22       <sup>4</sup> It is noted on review that Ms. Williams assessment is  
23 unsupported by her clinic notes, and is internally inconsistent.  
24 Specifically, she confirms an indication of DAA, (Tr. 271), but does  
25 not recommend treatment in spite of clinic notes that document  
26 Plaintiff's positive test for cocaine. Significantly, she renders  
27 no opinion regarding Plaintiff's ability to work. (Tr. 273.)  
28

1 characterizes the ALJ's actions as a failure to develop the record.  
2 (ECF No. 14 at 14-15.) However, an ALJ's duty to develop the record  
3 further is triggered "only when there is ambiguous evidence or when  
4 the record is inadequate for proper evaluation of evidence." *Mayes*  
5 v. *Massanari*, 276 F.3d 453, 4509-60 (9<sup>th</sup> Cir. 2001)(citing  
6 *Tonapetyan*, 242 F.3d at 1150). Plaintiff fails to show the evidence  
7 before the ALJ was ambiguous or inadequate to assess the record  
8 submitted by Plaintiff.

9 In disability proceedings, the initial burden of proof is on  
10 the claimant to provide medical evidence of an impairment. Objective  
11 evidence consisting of signs, symptoms, and laboratory findings is  
12 required; the claimant's own statement of symptoms alone will not  
13 suffice. 20 C.F.R. §§ 404.1508, 416.908. Once medical evidence is  
14 provided by the claimant, the Regulations state the agency "will  
15 develop your complete medical history for at least the 12 months  
16 preceding the month in which you file your application unless there  
17 is a reason to believe that development of an earlier period is  
18 necessary." 20 C.F.R. §§ 404.1512 (d), 416.912 (d).

19 As directed by the Regulations, additional consultative exams  
20 are purchased after consideration of the existing medical record and  
21 a claimant's allegations contained in the disability interview.  
22 Only if there is a determination that the information is ambiguous  
23 or inadequate to support a decision (i.e., includes no clinical  
24 findings, laboratory tests, or diagnoses) is additional evidence  
25 required. The ALJ is required to seek additional evidence only if  
26 the evidence already present consistently favors the claimant.  
27 *Lewis v. Apfel*, 236 F.3d 503, 514-15 (9<sup>th</sup> Cir. 2001). There is no  
28

1 affirmative duty to order additional examinations. 20 C.F.R. §§  
2 404.1519a, 416.919a; see also *Diaz v. Secretary of Health and Human*  
3 *Services*, 898 F.2d 774, 778 (10<sup>th</sup> Cir. 1990)(Commissioner has broad  
4 discretion in ordering consultative exams).

5 Here, the record shows the Social Security Administration (SSA)  
6 met its burden upon receipt of medical records up to and including  
7 October 2007, by ordering additional evidence in the form of a  
8 consultative physical exam, dated February 16, 2008, and a  
9 consultative psychological examination. (Tr. 423-30, 441-47.) In  
10 its request for evaluation, the agency specifically identified the  
11 alleged impairments to be considered: "bipolar/manic  
12 depression/spinal bifida/back fusion;" "gait & station, ability to  
13 use hands for grasping & manipulating, fine & dexterous movement;  
14 ability to perform work related activities." (Tr. 423.) As discussed  
15 above, the ALJ thoroughly evaluated the consultative examinations  
16 and reasonably found they supported his finding that Plaintiff was  
17 capable, at most, of light unskilled work. Plaintiff identifies no  
18 ambiguous information in the consultative reports that would  
19 reasonably require ordering additional evaluations.

20 Regarding Plaintiff's argument that remand is necessary to  
21 obtain records he claims existed at the time of the hearing,  
22 Plaintiff fails to show good cause for his failure to submit  
23 additional records after the hearing. On July 25, 2009, the SSA  
24 sent a compact disc of the existing record to Plaintiff's counsel,  
25 who was directed specifically to submit any additional records to  
26 support Plaintiff's application prior to the hearing. (Tr. 168-69.)  
27 As noted by the ALJ, Plaintiff and his representative were notified  
28

1 of the October 2009 hearing on September 1, 2009. (Tr. 82-86.) In  
2 that notice, Plaintiff was advised again that he could submit  
3 additional evidence, and that it was "very important that the  
4 evidence in your file is complete and up-to-date." (Tr. 83.) At  
5 the hearing, neither Plaintiff nor his representative indicated new,  
6 probative records existed. The ALJ reasonably found good cause did  
7 not exist to continue the hearing. Further, Plaintiff has failed to  
8 show prejudice resulted due to the denial of a continuance.

9 Plaintiff and his representative were given the opportunity to  
10 submit evidence to the Appeals Council in his request for review of  
11 the ALJ's decision, evidence that would have been part of record on  
12 review by this court. (Tr. 14-15.) *Ramirez v. Shalala*, 8 F.3d  
13 1449, 1452 (9th Cir. 1993); *Gomez v. Chater*, 74 F.3d 967, 971 (9th  
14 Cir. 1996). Finally, if there were relevant mental health records  
15 that were difficult to obtain prior to the Appeals Council review,  
16 Plaintiff could have filed them with his Complaint in this court for  
17 a determination of whether good cause existed for their lack of  
18 production prior to judicial review. 42 U.S.C. § 405(g); see also  
19 *Melkonyan v. Sullivan*, 501 U.S. 89, 102 (1991); *Burton v. Heckler*,  
20 724 F.2d 1415, 1417 (9<sup>th</sup> Cir. 1984). From these facts, it can  
21 reasonably be inferred that no additional records exist that are  
22 relevant to the period between 2007 and the date of the ALJ hearing,  
23 and, therefore, remand is not warranted. *Ortez v. Shalala*, 50 F.3d  
24 748, 751 (9<sup>th</sup> Cir. 1995); *Burton*, 724 F.2d at 1417.

25 **E. RFC Determination**

26 Plaintiff claims the ALJ's failure to account for all  
27 limitations "calls into question his overall determination" of  
28

1 Plaintiff's RFC. (ECF No. 14 at 13.) However, as discussed in  
2 detail above, ALJ Hertzig's interpretation of the medical evidence  
3 in its entirety, as well as Plaintiff's credible testimony, is  
4 supported by substantial evidence and free of legal error.

5 Plaintiff appears to argue the ALJ erred when he failed to find  
6 non-exertional limitations caused by Plaintiff's limited skills in  
7 math, reading, and understanding. (ECF No. 14 at 17.) However, the  
8 inclusion of a restriction to unskilled work reflects these  
9 limitations. "Unskilled work" involves simple duties that can be  
10 learned on the job and require little or no judgment. 20 C.F.R. §§  
11 404.1568, 416.968; *Terry v. Sullivan*, 903 F.2d 1273, 1276-77 (9<sup>th</sup>  
12 Cir. 1990). As noted above, Plaintiff reported an adequate ability  
13 handle money, pay bills, and perform activities of daily living that  
14 require reading, writing and math. Plaintiff offers no evidence  
15 that his limited academic skills prevent him from performing  
16 unskilled work. Further, he has not demonstrated that depressive  
17 disorder symptoms significantly limit his range of work. The record  
18 shows Plaintiff reported relief from medication, as long as he  
19 complied with prescribed treatment and did not abuse illegal drugs.  
20 (See, e.g., Tr. 345.) Impairments that are controlled effectively  
21 with medication are not disabling. *Warre v. Commissioner of Soc.*  
22 *Sec. Admin.*, 439 F.3d 1001, 1006 (9<sup>th</sup> Cir. 2006).

23 A review of the record in its entirety shows the final RFC  
24 includes all limitations supported by the record and Plaintiff's  
25 credible testimony. Where, as here, the ALJ's findings reflect a  
26 rational interpretation of the entire record and are supported by  
27 substantial evidence, the court may not substitute its judgment for  
28

1 that of the Commissioner. 42 U.S.C. § 405(g); *Tackett*, 180 F.3d at  
2 1097; *Andrews*, 53 F.3d at 1039 (findings supported by substantial  
3 evidence are conclusive); *SSR* 96-8p.

4 **F. Application of the Grids**

5 Plaintiff argues that due to the presence of non-exertional  
6 limitations, the ALJ erred when he did not use a vocational expert  
7 in determining his ability to perform other work in the national  
8 economy. He contends non-exertional limitations require the  
9 testimony of a vocational expert, and the ALJ's reliance on the  
10 Medical-Vocational Guidelines, 20 C.F.R. Pt. 404, Subpt. P., App. 2.  
11 (Grids) to make his determination was error. (ECF No. 14 at 21.)

12 The Medical-Vocational Guidelines take administrative notice of  
13 over 2,500 medium, light, and sedentary unskilled jobs. Where non-  
14 exertional limitations would not significantly erode an occupational  
15 base, application of the Medical-Vocational Guidelines is  
16 appropriate. *Desrosiers v. Secretary of Health and Human Serv's*,  
17 846 F.2d 573, 577 (9<sup>th</sup> Cir. 1988) ("non-exertional limitations do not  
18 automatically preclude application of the grids"); *Razey v. Heckler*,  
19 785 F.2d 1426, 1430 (9<sup>th</sup> Cir. 1986).

20 In determining whether the Grids apply at step five, the ALJ  
21 must find whether non-exertional limitations "significantly" limit  
22 the range of work permitted by Plaintiff's exertional limitations.  
23 *Desrosiers*, 486 F.2d at 577 (citing *Razey*, 785 F.2d at 1430). If  
24 the limitation is slight, use of the Grids is appropriate. *Id.*; see  
25 also *Tucker v. Heckler*, 776 F.2d 793, 795-96 (8<sup>th</sup> Cir.  
26 1985) (unnecessary to call vocational expert where ALJ thoroughly  
27 considered claimant's non-exertional impairments and explicitly  
28

1 determined that they did not diminish claimant's exertional  
2 capacities).

3 As discussed above, the ALJ carefully considered non-exertional  
4 limitations supported by the credible evidence. He properly  
5 rejected possible lapses in attention and concentration due to  
6 personality issues mentioned by Dr. Gentile. (Tr. 24.) Symptoms  
7 from depression and anxiety were found to be controlled effectively  
8 with medication. Neither medical evidence nor Plaintiff's self  
9 reported activities support the duration of postural limitations  
10 noted in early 2008, shortly after Plaintiff's left knee surgery.

11 The ALJ reasonably determined Plaintiff's ability to perform  
12 light work was limited only by the mental limitation to unskilled  
13 work. (Tr. 25.) The record supports this conclusion and is  
14 consistent with Plaintiff's limited education and academic  
15 abilities. Because the ability to perform light work includes the  
16 full range of sedentary work, the ALJ's finding that the identified  
17 non-exertional limitation did not significantly erode Plaintiff's  
18 occupational base is a rational determination supported by case law,  
19 the Commissioner's ruling, and substantial evidence in the record.  
20 *Desrosiers*, 486 F.2d at 577; SSR 83-10 (occupational base  
21 established by RFC includes all occupations at lower exertional  
22 level). (Tr. 442, 444-45.) The ALJ did not err in applying the  
23 Grids at step five. Accordingly,

24 **IT IS ORDERED:**

25 1. Plaintiff's Motion for Summary Judgment (**ECF No. 13**) is  
26 **DENIED**;

27 2. Defendant's Motion for Summary Judgment (**ECF No. 20**) is  
28

**GRANTED.**

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for Defendant, and the file shall be **CLOSED**.

DATED February 7, 2012.

S/ CYNTHIA IMBROGNO  
UNITED STATES MAGISTRATE JUDGE